FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeals of

ELIZABETH CAMPBELL, ET AL.

of adequacy of the FEIS issued by the Director,
Seattle Office of Housing

Hearing Examiner File:
W-18-002

Introduction

The Director of the Seattle Office of Housing ("City") issued a State Environmental Policy Act ("SEPA") Final Environmental Impact Statement ("FEIS") for the Fort Lawton Army Reserve Center Development Project ("Project") on April 12, 2018. The FEIS has been appealed by the Discovery Park Community Alliance and Elizabeth Campbell ("Appellants").

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. After considering the evidence in the record and reviewing the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Procedural History

1. On May 15, 2018, a prehearing conference was held regarding this matter. Represented at the conference were the Appellants, Elizabeth Campbell and Discovery Park Community Alliance, represented by Elizabeth Campbell. During the prehearing conference the parties identified a schedule for pre-hearing motions, final witness and exhibit lists and exchange of exhibits, and a hearing schedule. Under the pre-hearing order Appellants were required to file and serve their final witness list and final exhibit list, no later than 5:00 PM on August 31, 2018.

2. Appellants never filed a final witness list and final exhibit list.

3. On September 14, 2018 the City filed a Motion to Exclude Exhibits and Witnesses due to Appellants' failure to file required exhibit and witness lists.

4. Appellants filed a motion for stay of proceedings to allow them time to secure counsel on September 20, 2018.

5. The City's motion to exclude was granted on September 28, 2018. As a result, Appellants were barred from introducing witnesses or exhibits to the record. Only legal argument remained available to Appellants to proceed with their case. In addition, Appellants' motion

for stay was granted for thirty-days to secure legal counsel before a new hearing date of October 29, 2018.

6. On October 24, 2018, a prehearing conference was held regarding this matter. The purpose of this second pre-hearing conference was to set a hearing schedule, and determine Appellants' preparedness for hearing. The Appellants failed to appear.

7. Appellants' failure to appear at the second pre-hearing conference, and failure to file exhibit and witness lists, were sufficient grounds for this matter to be dismissed. However, the Appellants were afforded a final opportunity to pursue their case. As there was no opportunity remaining for Appellants to introduce new evidence or testimony, the hearing scheduled for Monday October 29, 2018 was canceled. The parties were directed to address any remaining issues in this matter in the form of legal briefing, and were provided a briefing schedule. Both parties submitted materials. The Appellants submitted a Notice of Appearance for counsel, a Motion to Reopen Discovery, and a copy of their Notice of Appeal as an Opening Brief. The City filed a Motion to Strike the Notice of Appeal as an Opening Brief. The Appellants filed a response to the City's motion to strike.

Motion to Reopen Discovery

8. The cutoff for discovery was set by prehearing order as August 24, 2018. The Appellants moved for a continuance on the basis that they were aware of new information concerning a potential alternative location for the proposal that is the subject of the Environmental Impact Statement ("EIS") under appeal in this matter. Appellants identified no specific reason to continue the dates set forth in the prehearing order issued on May 23, 2018. Appellants had an extensive period in which to address discovery. Nothing in the original motion identified the availability of new information related specifically to the EIS appeal. The Appellants' renewed motion through counsel does not identify any reason for granting the motion except a general reference to Appellants' Due Process Rights, which have been fully satisfied by the opportunity for hearing provided to the Appellants as outlined in the May 23, 2018 pre-hearing order.

9. Appellants' motion also impliedly acts as an untimely motion to reconsider the Hearing Examiner's earlier order concerning Appellants' failure to file witness or exhibit lists. The Hearing Examiner's Order issued on September 28, 2018 states:

> The Office of Hearing Examiner consistently does not allow exhibits or witnesses to be introduced at hearing that have not been disclosed in an exhibit or witness list when such lists are required in advance of a hearing. If a party attempts to introduce a witness or exhibit as part of its case in chief that was not included on a required witness or exhibit list, then such evidence is excluded at hearing. The Pre-hearing Order for this matter issued on May 23, 2018 required that Appellants file their exhibit and witness lists by August 31, 2018. The Pre-hearing Order states: "Except for purposes of impeachment or rebuttal, only those witnesses and exhibits listed by the parties may be offered at the hearing." The reason for this

> restriction is that a party should not be able to submit evidence and testimony by surprise, and thereby put the opposing party at a disadvantage. The Appellant has authored and filed a Motion to Extend Deadlines on September 4, 2018, a reply brief in support of that same motion on September 12, 2018, a Motion for Reconsideration of the Examiner's Decision Denying Appellants Motion for Continuance on September 19, 2018, a Response to the City's Motion to Exclude and Dismiss on September 20, 2018, and a Motion for Stay on September 20, 2018, all of which demonstrate Appellants' capacity to draft documents and work on this case, and/or the ability to have communicated at an earlier date that Appellants did not have the capacity to identify exhibits and witnesses within the time required. By failing to identify exhibits and witnesses in advance of the hearing the Appellants have failed to comply with a Hearing Examiner Order, and put the opposing party at a disadvantage to prepare for the hearing.
>
> (footnote omitted)

10. Appellants' renewed request fails to overcome the issues identified in the September 28, 2018 Order, and is an untimely request for reconsideration. Notably, Appellants not only missed the deadline to file a witness or exhibit list – they never did. Thus, Appellants were not merely late in filing required materials, they never made an attempt to correct their error. Appellants' Motion to Reopen Discovery is **DENIED**.

Motion to Strike

11. The City filed a motion to strike the Notice of Appeal as an Opening Brief. There are no strict guidelines concerning what a party must file concerning an opening brief to argue its case. Appellants have elected to file their Notice of Appeal, and stand their case on that document. The City's Motion to Strike is **DENIED**.

Appeal

12. The Appellants' Opening Brief/Notice of Appeal raises a variety of issues including:

    a. That the FEIS alternatives analysis is inadequate;
    b. The FEIS fails to disclose and analyze probable significant adverse impacts associated with the Project including those related to: land use, recreation and open space, transportation, historic and cultural preservation, biological resources, earth, noise, public services, aesthetics/visual resources, and housing;
    c. The City failed to follow BRAC procedures;
    d. Improper incorporation of the U.S. Army Corps of Engineers' Environmental Assessment and Findings of No Significant Impact;
    e. Inadequate notice;
    f. Failure to identify and analyze the socioeconomic impacts from the Army's closure of its Reserve Center;

g. FEIS failure to address the Discovery Park Masterplan;
h. The FEIS improperly identifies and characterizes the Project; and
i. The FEIS environmental justice analysis is inadequate.

Applicable Law

13. "To be adequate, the EIS must present decisionmakers with a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision. Adequacy is judged by the 'rule of reason,' a 'broad, flexible cost-effectiveness standard,' and is determined on a case by case basis, considering 'all of the policy and factual considerations reasonably related to SEPA's terse directives.'" *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp.*, 90 Wn.App. 225, 229, 951 P.2d 812 (1998) (citations omitted).

14. "In determining whether a particular discussion of environmental factors in an EIS is adequate under the rule of reason, the reviewing court must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and substantiated by supportive opinion and data." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 644, 860 P.2d 390 (1993).

15. In an appeal of an FEIS "the decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090.

16. "The requirement that only reasonable alternatives be discussed in an EIS is intended to limit the number of alternatives considered, as well as the detailed analysis required for each alternative. WAC 197-11-440(5)(b)(i). The discussion of alternatives in an EIS need not be exhaustive if the impact statement presents sufficient information for a reasoned choice of alternatives." *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn.App. 439, 446, 832 P.2d 503 (1992).

17. SMC Chapter 25.05 details the City's environmental policies and procedures, and SMC Chapter 25.05 Subchapter IV identifies requirements for an Environmental Impact Statement.

18. "The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decisionmaking process, when the principal features of a proposal and its environmental impacts can be reasonably identified." SMC 25.05.055.A.

19. "Agencies shall make certain that the proposal that is the subject of environmental review is properly defined . . . A proposal by a lead agency or applicant may be put forward as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action." SMC 25.05.060.

20. Pursuant to SMC 25.05.400.C, "Environmental impact statements shall be concise, clear, and to the point, and shall be supported by the necessary environmental analysis. The

purpose of an EIS is best served by short documents containing summaries of, or reference to, technical data and by avoiding excessively detailed and overly technical information."

21. SMC 25.05.402 calls for the following in EIS preparation:

> EISs need analyze only the reasonable alternatives and probable adverse environmental impacts that are significant. Beneficial environmental impacts or other impacts may be discussed.
>
> The level of detail shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or referenced.
>
> Description of the existing environment and the nature of environmental impacts shall be limited to the affected environment and shall be no longer than is necessary to understand the environmental consequences of the alternatives, including the proposal.

SMC 25.05.402 A, B and D.

Conciusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director's decisions. SMC 25.05.680.B.3. The Appellant bears the burden of proving that the FEIS is legally insufficient within the standards set by SEPA. Appellants as a result of their failure to prosecute their case by never attempting to disclose witnesses and exhibits, and failure to appear at a scheduled conference were prohibited from entering evidence into the record, and were thereby restricted to presenting legal arguments for issues that did not require the support of evidence. None of the issues raised by Appellants in their Opening Brief/Notice of Appeal are strictly legal arguments that can be supported without evidence. As such none of Appellants' arguments meet their burden of proof required to prevail in their appeal.

2. An agency need follow only a 'rule of reason' in preparing an EIS, and ... this rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'" *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978)) (citation omitted).

   SMC 25.05.060.C.1 indicates "Agencies shall make certain that the proposal that is the subject of environmental review is properly defined . . . A proposal by a lead agency or applicant may be put forward as an objective, as several alternative means of accomplishing a goal, *or as a particular or preferred course of action*," (emphasis added).

   SMC 25.05.440.D.2 requires that an EIS describe the preferred alternative and alternative courses of action and that "reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives."

The Appellants' arguments identified other alternative means of achieving the identified objectives, but there is no requirement for an agency preparing an EIS to explore every alternative to the proposal, or even the most reasonable alternative presented by opponents to the proposal. Where the City's determination is owed substantial deference, it is not adequate for the Appellants to simply suggest another alternative means of achieving the objectives. Appellants introduced no evidence to demonstrate that their suggested alternatives meet the proposal's objectives as identified by the City.

3. Appellants challenged whether the alternatives analyzed would actually achieve the objectives of the Project. The Appellants did not demonstrate that any of the alternatives identified in the FEIS would not achieve the objectives of the proposal.

4. Appellants did not introduce evidence sufficient to show the probability of any significant adverse impact that might result from the Project including, but not limited to such impacts that might be associated with: land use, recreation and open space, transportation, historic and cultural preservation, biological resources, earth, noise, public services, aesthetics/visual resources, housing, socioeconomics, and environmental justice. Under SEPA the Appellants must meet the high burden of demonstrating the reasonable probability of the significant impact which they allege. This evidentiary standard is not met by the mere statement from Appellants that they believe there will be significant impacts alleged in a Notice of Appeal. Instead, the probability of significant adverse negative impacts must be demonstrated by actual analysis and evidence showing a more than moderate impact on the environment.

5. The Appellants did not demonstrate how or if the issue they raised concerning failure of the City to follow BRAC procedures is related to challenging the adequacy of the FEIS.

6. To the degree Appellants have argued that the City is barred by SEPA from adopting the FEIS and using the Army Corps Environmental Assessment, the appeal is denied, because the City is permitted to take these actions to fulfill its SEPA procedural requirements. *See e.g.* SMC 25.05.610. Courts have consistently upheld SEPA's rules allowing for reuse of existing environmental documents "[t]o avoid 'wasteful duplication of environmental analysis and to reduce delay." *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 50, 52 P.3d 522 (2002).

> Adoption of an existing EIS is explicitly authorized when "a proposal is substantially similar to one covered in an existing EIS." If an agency adopts existing documents, it must independently assess the sufficiency of the document, identify the document and state why it is being adopted, make the adopted document readily available, and circulate the statement of adoption.

Id. at 51. (citations omitted).

Generally, there is no procedural error under SEPA simply because the Environmental Assessment does not include the items of concern to Appellants. Appellants must demonstrate the inadequacy of that document, and they have not done so.

7. The Appellants argued that the SEPA notice was inadequate, but did not support this argument with evidence, and the issue as framed does not clearly implicate a failure to follow notice requirements.

8. Appellants' issue concerning FEIS failure to address the Discovery Park Masterplan does not clearly identify an inadequacy of the FEIS under SEPA.

9. The Appellants did not demonstrate that the FEIS improperly identifies and characterizes the Project.

Decision

The Director's determination that the FEIS is adequate is **AFFIRMED.**

Entered this 29th day of November, 2018.

Ryan Vancil
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Elizabeth Campbell, et al.**, Hearing Examiner File: **W-18-002,** in the manner indicated.

Party	Method of Service
Appellant Legal Counsel Nathan Arnold nathan@jjalaw.com lesley@jjalaw.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
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Dated: November 29, 2018

Alayna Johnson
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